Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CLIFFORD F. GURNEY, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Federal Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

A serious error of fact concerning the nature of the property affected by the Settlement Agreement forms the lynchpin of the United States' opposition to the grant of *certiorari*. The government urges that its appropriation of petitioners' property was a "regulatory" action, a view unequivocally rejected by the court of appeals and surely incorrect. Specifically, the government contends that only real property may be taken *per se* and that, therefore, because petitioners did not possess real property, partial compensation for the appropriation of that property is permissible. The government is wrong on both counts. This Court has never held that personal property may be appropriated for public use without just compensation. Further, it is undisputed that real, as well as intangible, property was taken here. Because these errors interleave the entire opposition, petitioners submit this reply.

1. The government asserts that it took from petitioners only "an inchoate and uncertain claim against a foreign sovereign." Opp. Br. 14. It is a matter of established fact that some petitioners had real property, fee simple absolute, directly transferred by the Agreement to Iran. Pet. App. 84a-90a; Pet. App. 63a. Others had personalty other than choses in action. *See, e.g.*, Pet. App. 76a. For this reason, the espousal and transfer worked by the Settlement Agreement was not limited to "claims" or *choses in action*. Real property (and other tangible property) owned by U.S. nationals on the effective date of the Agreement was expropriated by the United States and transferred to Iran in addition to claims. This is perfectly illustrated by the example of petitioner Fardanesh who, prior to the settlement agreement, owned two parcels of land in Iran. Alleging that Revolutionary Guards had occupied the property, he filed a claim at the Tribunal for damages.

After the settlement agreement, the Commission determined that Mr. Fardanesh's property had, in fact, not been appropriated by Iran. This did not mean, however, that he still owned the property. He did not because the United States had conveyed it to Iran pursuant to Article VII of the Settlement Agreement. Title changed hands by means of the Settlement Agreement.

The government not only misstates the facts regarding the property interests taken, but ignores that espousal is appropriation, not regulation.[1] That an espousal is a taking *per se* cannot be doubted, regardless of the type of property interest at issue. In *Mugler v. Kansas*, the Court noted the difference between a regulatory act and an appropriative act:

> The present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.

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[1]*See La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 459 (1899).

123 U.S. 623, 668 (1887).

This distinction has been applied many times since *Mugler*, notably in two cases upon which the government relies here: *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 489 (1987), and *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). The government also cites *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979), in which the same distinction was drawn: "The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather a significant restriction has been imposed on one means of disposing of the artifacts . . . In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds." For this reason, a regulatory analysis was appropriate.[2]

In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court held that a Presidential program of forum-shifting of claims[3] (short of espousal) could result in a taking. The availability of the Tucker Act remedy where plaintiffs could be made whole if the Presidential program failed to provide just compensation constituted an adequate remedy at law, according to this Court, thereby defeating Dames & Moore's request in equity to enjoin the provisions of the Algiers Accords. But in

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[2]The result in *Allard* was **not** dictated by the fact that the Court had not previously held that regulation of the sale of eagle feathers could constitute a taking. Similarly, the government's incantation that the Court has never held that the extinguishment of international claims gives rise to a Fifth Amendment obligation is no substitute for reasoned analysis. The Court long ago determined that choses-in-action are property protected by the Fifth Amendment, *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 245 (1796), and not long ago at all determined that even the diminution of such property would be cognizable under the Tucker Act. *Dames & Moore*.

[3]The Court did not discuss real property.

Dames & Moore there had been no taking at the time this Court heard the case. First, the Accords did not extinguish claims or transfer property. Secondly, the compensation proceeding had not been conducted, so there was no way to tell if the ultimate compensation was just or not.

Both elements missing in *Dames & Moore* are present here. First, the extinguishment and transfer provisions of the Settlement Agreement bear only one meaning -- what was petitioners' became the property of the United States which then transferred it to Iran. This is a classic appropriation. Second, there has been a valuation procedure by the Foreign Claims Settlement Commission, which if not perfect, is by statute final. 22 U.S.C. § 1623(h). This damage award cannot be challenged by petitioners or the United States. *See DeVegvar v. Gillilland*, 228 F.2d 640 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 994 (1956). And petitioners received payments *in every case* less than the damage award plus interest to the date of payment. The Commission was not free to award the full amount due petitioners, however, but was restricted to parceling out a *pro rata* share of the amount allocated to it by the government from an amount set by the executive, not the judicial, department. The executive, though a trustee for the claimants, paid them what was left over after the government took what it wanted to satisfy its own claims.

In this case, as the facts show and as the court of appeals held, petitioners were completely deprived of their property. The government took it in an act of eminent domain, and traded it to Iran.[4]

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[4]The decisions below assure there can never be a taking of property in the context of an espousal/transfer no matter what value the President, acting alone, puts on the claims. Petitioners are at a loss to understand how, (continued...)

2. As its sole basis for the use of regulatory takings analysis, the government suggests that the Court's distinction between "regulatory" and "per se" takings is limited to real property. Opp. Br. 16. This is wrong -- the Court has applied a "per se" analysis to the taking of personalty: *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-64 (1980). And the Fifth Amendment certainly protects even intangibles or other personal property. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 & n.9 (1984); *Armstrong v. United States*, 364 U.S. 40 (1960); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893) (finding taking of right to collect tolls prior to development of regulatory taking doctrine); *Hollister v. Benedict & Burnham Manuf. Co.*, 113 U.S. 59 (1885); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1852) (suggesting, in dicta, that appropriation of supplies for military use would have required just compensation, had it been authorized). Further, the Court has never suggested that the Fifth Amendment somehow provides lesser protection for personal property from appropriation for public use. In *Lucas v. South Carolina Coastal Council*, the Court observed that owners of personalty ought to expect the possibility of *regulation*, because of the State's "traditionally high degree of control over commercial dealings." 505 U.S. 1003, 1027 (1992). The Court cited *Allard*, 505 U.S. at 1028, which in turn relied upon *Everard's Breweries v. Day*, 265 U.S. 545 (1924), and *Jacob Ruppert, Inc. v Caffey*, 251 U.S. 264

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[4](...continued)
as the government indicates, the Court's holding in *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), is not implicated by this conclusion. Every case is susceptible to the "analysis" of the court of appeals that petitioners are merely dissatisfied with the Settlement "negotiated by the government" and thus that there is no "compensable taking." Petitioners are indeed dissatisfied with any compensation other than just compensation for their property.

(1920). In these cases, the Court carefully distinguished between the permissible -- regulation of certain uses of personal property -- and the implicitly impermissible -- appropriation of the affected property. *See Allard*, 444 U.S. at 66-67; *Jacob Ruppert*, 251 U.S. at 303.

At bottom, the assertion that personalty is more susceptible to regulation is really another aspect of the "antecedent inquiry" requirement articulated later in *Lucas*, 505 U.S. at 1029-30, but misapplied below. Pet. 21-29. In any takings claim, it is of course necessary to ascertain what interest has been "taken" by the government and that the interest was in fact possessed by the claimant.[5] Real property (including that owned by some petitioners) includes a well settled right to exclude so that physical occupation can easily be seen to be a taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982). But the Court's rationale for concluding that appropriation of even a small part of real estate is a taking of land applies to personalty as well. In *Loretto*, the Court explained that "[p]roperty rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' To the extent that the government permanently occupies physical property, it destroys each of these rights." 458 U.S. at 435 (citation omitted). This same logic very obviously applies when the government takes possession of any item of personalty. Or even an intangible.

Petitioners agree that some scrutiny of the nature of their property interests is appropriate. However, the *Lucas* antecedent inquiry must be properly conducted. To obtain summary judgment, it was not enough for the government to argue that simply because some petitioners had property other

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[5]*See, e.g., Scranton v. Wheeler*, 179 U.S. 141, 163 (1900) (private property held subject to government's navigational servitude).

than land, the government is therefore free to appropriate all property without payment of just compensation, paying only an amount set by the President, not a court. The government must show that under the law that controls the very existence of the property, it has some "easement" that allows it to completely appropriate the property without just compensation. This it has not done and cannot do.

* * *

In addition to the serious errors noted above, the government's brief contains two misstatements of the record that cannot pass unremarked: (a) that petitioners are seeking to overturn this Court's regulatory taking jurisprudence; and (b) that the Settlement Agreement was intended to benefit petitioners.

3. Petitioners do not argue that "any government action is a taking if it diminishes the value of property or fails to afford benefits of exactly equivalent value." Opp. Br. 15. The taking analysis turns on the governmental action--here an outright appropriation and transfer. Nor do petitioners contend that the government must pay compensation whenever regulatory action diminishes the value of property, or every time the government otherwise imposes some cost on a citizen. There is thus nothing in petitioners' argument that is inconsistent with the holdings of *Keystone*, *Allard*, *Goldblatt*, or *United States v. Sperry Corp.*, 493 U.S. 52 (1989). Petitioners' argument -- and the government should have been able to understand this -- is that when the government takes *possession* of a citizen's property to put it to public use, the Constitution requires payment of just compensation. Just compensation is fair market value at the time of the taking plus interest from the date of the taking to the date of payment. It is, moreover, petitioners' position that partial compensation --

either in the form of partial payment, the conferring of some benefit worth less than the property appropriated, or some combination of the two -- does not satisfy this constitutional mandate.

4. The government asserts -- without any citation to the factual record -- that the government entered into the settlement agreement with the intent of benefitting petitioners. Opp. Br. 15. There is simply **no** evidence concerning the government's intent in the record -- indeed, in the trial court, the government suggested that the court was not permitted to examine its motives in entering into the settlement. But the consequences for petitioners of the Settlement Agreement belie any such benign motive. The procedures before the FCSC were neither significantly "swifter and surer"[6] than those of the Iran-United States Claims Tribunal which they replaced. Large claimants (like the small claimants prior to the Settlement Agreement) to this day receive awards with full interest to the date of payment by the settlement bank in Amsterdam, thereby obviating any perceived significance of delay. And the "batting average" at the FCSC for small claims was drastically worse than at the Tribunal. Only a third of claimants at the FCSC received any money at all, while at the Tribunal over 85%of small claims concluded received awards. Pet. App. 47a.

Thus, the transfer of petitioners' claims to the FCSC, where they got smaller awards and prevailed less frequently, cannot fairly be regarded as a "benefit" to them as the courts below seemed to believe. The government does not even try to argue that petitioners who lost real property as the result of the settlement were benefitted by it. In any event, such a benefit ought to be relevant only in the damages phase of a Tucker Act

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[6] Opposition at 14.

proceeding, not to a decision holding that the petitioners had no "compensable interest" in their lands, bank accounts and choses-in-action.

The FCSC was directed to apply Tribunal precedent to the small claims, must be presumed to have done so, and its decisions cannot now be challenged by the government or petitioners. Thus, the government's suggestion that it is a "dubious assumption" that petitioners would have prevailed at the Tribunal is both factually erroneous and legally impermissible. For all practical purposes at this stage, the FCSC sat as the Tribunal and its decisions rest on the same footing.

CONCLUSION

For the foregoing reasons, and the reasons stated in our petition, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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